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A guide to the exemptions in the Montana

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A GUIDE TO THE EXEMPTIONS
IN THE
MONTANA SUBDIVISION AND PLATTING ACT
FIRST EDITION

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Montana Department of Commerce
Local Government Assistance Division
Community Technical Assistance Program

March 1990

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TABLE OF CONTENTS

	<u>Page</u>
PREFACE	2
EXEMPTIONS TO MSPA	
	MCA Citation
20 Acres or Larger	76-3-103(15) 3
Court Order or Operation of Law	76-3-201(1) 4
Law of Eminent Domain	76-3-201(1) 5
Mortgage Exemption	76-3-201(2) 6
Oil, Gas, Minerals, Water Interest Separated from Surface Ownership	76-3-201(3) 8
Cemetery Lots	76-3-201(4) 9
Reservation of a Life Estate	76-3-201(5) 10
Rent or Lease of Agricultural Land	76-3-201(6) 11
Improvements on Land Already Subdivided in Compliance with the MSPA	76-3-202 12
Condominiums Constructed on Land in Compliance with MSPA	76-3-203 13
Sale, Rent or Lease of a Structure or Improvement	76-3-204 14
State Owned Lands	76-3-205 15
Execution Prior to July 1, 1973 of Deeds, Contracts, Leases, or Other Conveyances	76-3-206 16
Relocation of a Common Boundary	76-3-207(1)(a) 17
Gift or Sale to a Family Member (family conveyance)	76-3-207(1)(b) 18
Sale of Agricultural Land with Covenant	76-3-207(1)(c) 20
Occasional Sale	76-3-207(1)(d) 22
5 or Fewer Lots within a Platted Subdivision	76-3-207(1)(e) 25
Relocation of a Common Boundary (between a single lot within a platted subdivision and adjoining land outside the subdivision)	76-3-207(1)(f) 26
Lands Acquired for State Highways	76-3-209 27
REMAINDER (discussion of)28

PREFACE

This Guide is designed to be used as a quick reference by county clerk and recorders, local government planners, surveyors, subdividers, and developers. This Guide gives an explanation of and legal technicalities for the exemptions to surveying or review of divisions of land under the Montana Subdivision and Platting Act. This should help local governments, surveyors, and developers more easily comply with provisions of the Act.

The Guide was developed by Ann Desch, Robb McCracken, and Rich Weddle of the Community Technical Assistance Program, Montana Department of Commerce. Much of the information was adapted from Appendix F of "A Manual for the Administrator of the Montana Subdivision and Platting Act", Montana Department of Commerce, 1986.

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Special Note on the Use of This Guide:

All surveyors, developers, landowners, and subdividers that use this guide need to find out whether or not the local government has adopted "evasion criteria" for the Montana Subdivision and Platting Act. Evasion criteria legally enable local governments to make local legal interpretations, policies, and judgement calls about the exemptions that cannot be incorporated in this Guide. Prior to doing any work on a proposed exemption, local government officials should be consulted to review local requirements.

20 ACRES OR LARGER
[76-3-103(15), MCA]

1. Definition: "Subdivision" means a division of land or land so divided which creates one or more parcels containing less than 20 acres, exclusive of public roadways, in order that the title to or possession of the parcels may be sold, rented, leased, or otherwise conveyed and shall include any resubdivision and shall further include any condominium or area, regardless of its size, which provides or will provide multiple space for recreational camping vehicles or mobile homes.

Tracts larger than 20 acres simply don't fall within the definition of "subdivision". Hence, these divisions of land are not required to be reviewed and also do not require a survey if the parcels can be described as a 1/32 or larger aliquot part of a section, per Section 76-3-401, MCA.

2. Exempt from local review and surveying requirements.

3. Intended purpose of exemption:

To allow large landowners such as farmers and ranchers to divide land, which could be used for these purposes, without going through review.

4. DHES review under MSIS - No.

5. Potential Problems: These 20-acre and larger parcels are most often resubdivided into smaller parcels through use of exemptions.

6. How to prevent misuse: N/A

7. Legal opinions clarifying the use:

* Regulation of land divisions which are excluded from the definition of "subdivision" -- The existence of an adopted master plan which calls for minimum lot size of 40 acres does not authorize a governing body to refuse to file a certificate of survey which depicts the creation of 20-acre or larger parcels. [42 Op. Att'y Gen. 16 (1987)].

* What parcels must be surveyed -- Only those parcels which are segregated from an original tract for purposes of transfer are subject to the Act's surveying requirements. A "remainder", i.e., that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer, is not subject to the Act's surveying requirements regardless of its size. [Letter opinion to Robert M. McCarthy, Esq., April 22, 1987].

* What constitutes a 1/32 aliquot part of a section -- For purposes of section 76-3-401, MCA, which requires that divisions of land, other than subdivisions, which cannot be described as 1/32 or larger aliquot parts of a section be surveyed, a 1/32 aliquot part need not be contained entirely within the same section. [Timberland Resources, Inc. v. Vaught (1987), 227 Mont. 247, 738 P. 2d. 1277].

COURT ORDER OR OPERATION OF LAW EXEMPTION [76-3-201(1), MCA]

1. Definition: A division of land created by order of any court of record in this state or by operation of law.
2. Exempt from local subdivision review and surveying requirements. If for some reason a COS is filed, the surveyor rather than the landowner can claim the exemption.
3. Intended purpose of exemption:

Creation of parcels as part of an estate or divorce settlement incorporated into a court order, a court-ordered division of land held jointly. Another example would be when a city abandons a street and the adjoining property owners each automatically receive title to the center line of the street. Neither they nor the city would have to file a COS claiming a boundary line adjustment.

4. DHES review under MSIS - No.

5. Potential Problems:

Little abuse of this exemption has occurred. An abuse (avoiding review) would occur where several parties purchased land as joint owners with the purpose of having a court divide the land into a number of parcels under individual ownership.

6. How to prevent misuse of this exemption (use of evasion criteria):

It is difficult for local officials to determine whether the process is a scheme developed to avoid subdivision review, or whether the court-ordered division resulted from legitimate circumstances.

7. Legal opinions clarifying the use of the exemption:

- * Division by operation of law -- (Attorney General's Opinion) The sale by a county of that portion of a subdivision lot which lies within a rural special improvement district to satisfy a lien against the property for unpaid R.S.L.D. assessments is a division of property "by operation of law" which is exempt from the provisions of the Act, under section 76-03-201(1), MCA. [39 Op. Att'y Gen. 48 (1982)]
- * Division by court order or operation of law -- (Attorney General's Opinion) In a probate proceeding an agreement between coinheritors of a tract of land to divide the tract among themselves under section 72-3-915, MCA, is not exempt from the Act under section 76-3-201(1), MCA, as a division of land by operation of law. However, when the agreement is incorporated into the court's decree of distribution or other order, the division is exempt under that section as a division by court order. [Opinion addressed to Robert Zeigler, Oct. 3, 1985]

LAW OF EMINENT DOMAIN EXEMPTION [76-3-201(1), MCA]

1. Definition: "...which, in the absence of agreement between the parties to the sale could be created by an order of any court in this state pursuant to the law of eminent domain (Title 70, Chapter 30 MCA).

A landowner who voluntarily wishes to sell land to a governmental unit or other entity which could condemn the property may claim the eminent domain exemption because even though the purchaser will not use eminent domain, it could use eminent domain to acquire the land.

2. Exempt from local subdivision review and surveying requirements. If for some reason a COS is filed, the surveyor rather than the landowner may claim the exemption. (See attached sheet for language to place on the COS or conveyance when claiming the exemption.)

3. Intended purpose of exemption:

The exemption for a division that could be created under the law of eminent domain allows a governmental agency (federal, state, cities, counties), private utility, mining company, irrigation district, or any entity which has the power of condemnation to create a parcel if the parcel could be created under the law of eminent domain (condemnation proceedings).

Utility companies have the power of eminent domain in certain situations; i.e., they can take property for their utility corridors upon compensating the owner. The parcel so taken as well as the land left over on either side of it would be exempt from both subdivision review and surveying and filing requirements.

4. DHES review under MSIS - No.

5. Potential Problems: No abuses.

6. How to prevent misuse of this exemption (use of Evasion Criteria): N/A

7. Legal opinions clarifying the use of the exemption:

Eminent domain - The term "the law of eminent domain" in section 76-3-201(1) MCA, includes federal condemnation proceedings, and the act's eminent domain exemption applies to conveyances of privately owned land to the United States Dept. of Agriculture pursuant to 16 U.S.C. section 485. [42 Op. Att'y Gen. 36 (1987)].

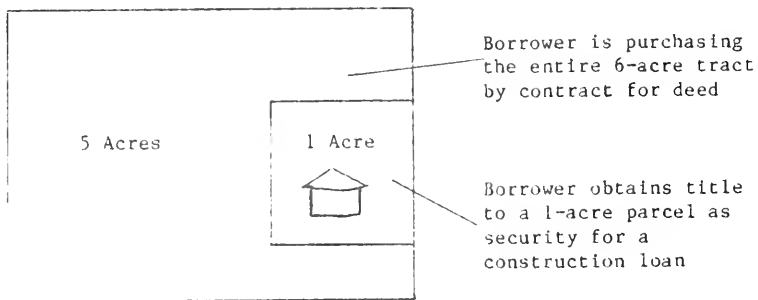
8. Note: Application to divisions of land by roads.

No abuses. A question frequently asked is whether state and federal highways divide land. They do in that the Highway Dept. can obtain fee simple ownership of state highways (60-4-101, MCA). However, counties cannot take title to county roads. They can only hold a right-of-way easement (7-14-2107(3), MCA). Therefore a county road does not divide land.

SECURITY FOR CONSTRUCTION FINANCING EXEMPTION [76-3-201(2), MCA]
(Mortgage exemption)

1. Definition: A division of land that "is created to provide security for construction mortgages, liens, or trust indentures."
2. Exemption from local subdivision review and surveying requirements. If for some reason a COS is filed, the surveyor instead of the landowner can claim the exemption.
3. Intended purpose of exemption:

To allow a landowner who is buying property under a contract for deed to obtain title to a separate parcel within that property to offer as security for financing for a loan to build a home (or building, if a commercial or industrial parcel). In other words, the buyer claims title to a small portion of the entire parcel so he actually owns something against which the bank could foreclose if there was a default on the loan. Lending institutions require that borrowers hold title to the parcel upon which the new building will be located and use this parcel as collateral or security for a loan or other financing to erect a dwelling or other building on that parcel. This exemption does not apply to divisions of land which are undertaken primarily to create a building site.



4. DHES review under MSIS - No.
5. Potential Problems:
 - A. Creation of a separate parcel with the ultimate intention of selling the parcel to a third party.

Use of this exemption does not require a survey, but most all lending institutions require a survey as a condition of securing construction financing. The very act of a seller on a contract for deed giving the buyer on a contract for deed the deed for the one-acre parcel creates a separate tract. Thus a discrete parcel is created for future transfer. Some counties have interpreted this to mean that this is a temporary transaction and that the parcel cannot be conveyed in the future except

by a bank. There appears to be no support in the MSPA for this view. [See 42 Op. Att'y Gen. 101 (July 25, 1988)]

- B. The exemption has been used to attempt to secure financing for construction on other property.
 - C. The statute does not limit the use of the construction mortgage to a residential dwelling. However, this could be specified in the evasion criteria.
6. How to prevent misuse of this exemption (use of Evasion Criteria):
- A. Require proof of required security from a qualified lending institution. This could be 1) a letter from the lending institution or a copy of the loan agreement stating the requirement for security, and 2) the deed, copy of mortgage, lien, or trust indenture for the exempt parcel, stating it is for mortgage purposes only.
 - B. Make sure that the person who is acquiring title to the exempted tract also holds possessory interest, under a contract for deed, in the surrounding or adjacent tract. (This could be established as a rebuttable presumption.)
7. Legal opinion clarifying the use of the exemption:

District Court - Use of exemptions within platted subdivisions - Section 76-3-201(2), MCA which exempts mortgage exemptions from the requirements of MSPA applies both within and outside of platted subdivisions. [West v. Klundt (Yellowstone County, No. DV-79-1221, 1979)]

Attorney General's opinion - "The subsequent sale of an undivided parcel of land that was segregated from another parcel to provide security for a construction lien is not subject to the health law." [(42 Op. Att'y Gen. 101 (1988))]

Prior to 1988 the DHES was requiring health review under MSIS when the parcel created for mortgage purposes was to be sold. However, they do not review these now in light of the Attorney General's opinion above.

**CREATES AN INTEREST IN OIL, GAS, MINERALS, OR WATER WHICH ARE SEPARATED
FROM THE SURFACE OWNERSHIP [76-3-201(3), MCA]**

1. Definition: A division of land which creates an interest in oil, gas, minerals or water which is now or hereafter severed from the surface ownership of real property; for example, selling of mineral rights, or reservation of mineral rights when selling land.

This exemption pertains to the situation where a landowner may want to sell the mineral or the water rights and retain ownership of the surface rights.

2. Exempt from local review and surveying requirements.

3. Intended purpose of exemption:

To allow a landowner to convey his subsurface interests in a piece of property without going through review, since such a conveyance doesn't involve a transfer of title to or possession of a portion of a tract of land.

4. DHES review under MSIS - No.

5. Potential Problems: None

6. How to prevent misuse of this exemption: N/A

7. Legal opinions clarifying the use of the exemption: None

CEMETERY LOTS EXEMPTION [76-3-201(4), MCA]

1. Definition: A division of land which creates cemetery lots.
2. Exempt from local subdivision review and surveying requirements under MSPA. However, 35-20-212, MCA requires the perimeter and lots of a cemetery to be surveyed and filed with the Clerk and Recorder.
3. Intended purpose of exemption:

To allow for creation of cemetery lots without requiring a survey or local government review where there are obviously none of the attendant potential development problems regarding health, safety, welfare.
4. DHES review under MSIS - No.
5. Potential Problems: None.
6. How to prevent misuse of this exemption: N/A
7. Legal opinions clarifying the use of the exemption: None.

RESERVATION OF A LIFE ESTATE EXEMPTION [76-3-201(5), MCA]

1. Definition: A reservation of a life estate is established when a person sells property, but reserves the right to live on a portion of (or use in some manner) the property until death, at which time the property reverts to the buyer.
2. Exempt from local subdivision review and surveying requirements. If for some reason a COS is filed, the surveyor rather than the landowner may claim the exemption.
3. Intended purpose of exemption:

To allow someone to sell this property, such as a large ranch or farm, but still continue to have the right to live in the house on the property. The rancher or farmer would retain title to the land on which his house or farmhouse stands, while the buyer would have title to the rest of the property. When the rancher or farmer dies the buyer receives title to the reserved portion of the land.
4. DHES review under MSIS - No.
5. Potential Problems: None
6. How to prevent misuse of this exemption: N/A.
7. Legal opinions clarifying the use of the exemption: None.

RENT OR LEASE OF AGRICULTURAL LAND EXEMPTION [76-3-201(6), MCA]

1. Definition: A division of land that is created by lease or rental for farming and agricultural purposes.
2. Exempt from local subdivision review and surveying requirements. If for some reason a COS is filed, the surveyor rather than the landowner may claim the exemption.
3. Intended purpose of exemption:

Since agricultural and farming uses do not have the attendant potential development pressures or problems, division is allowed without requiring local subdivision review or a survey. The intent is that the parcel of land would just be leased or rented (for pastureland, row crops, etc) and no residential structures would be built.

4. DHES review under MSIS - No.

5. Potential Problems:

The only difficulty that can arise is where a lessee builds a house or other structure, or uses the land for non-farming purposes.

6. How to prevent misuse of this exemption:

If the landowner contacts the county with questions on this exemption, county officials can stress that this exemption can only be used for situations where no structures will be built.

The subdivision administrator would have to discover the structure or other use, and investigate the records in the county clerk and recorder's office to determine whether the division was an abuse of the exemption.

7. Legal opinions, clarifying the use of the exemption - None.

**IMPROVEMENTS ON LAND ALREADY SUBDIVIDED IN COMPLIANCE WITH THE MSPA
[76-3-202, MCA]**

1. Definition: "Where required by this chapter, when the land upon which an improvement is situated has been subdivided in compliance with this chapter, the sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement situated on one or more parcels of land is not a division of land and is not subject to the terms of this chapter."
2. Exempt from local subdivision review and surveying requirements under MSPA.
3. Intended purpose of exemption:

To allow developers to not have to undergo subdivision review again if they have already subdivided the land in compliance with the Act.
4. DHES review under MSIS - Yes.
5. Potential Problems: Structures or improvements made years after the land was subdivided may not be appropriate with the current surrounding land uses. Local governments have no review authority at this point.
6. How to prevent misuse of this exemption: N/A
7. Legal opinions clarifying the use of the exemption:

* Sale, rent, or lease of all or a portion of a building -- Because Section 76-3-204, MCA, exempts the rental of both existing and new buildings from subdivision review, the construction of a building for apartment use is not subject to regulation under the Act. [Lee v. Flathead County (1985), 217 Mont. 370, 704 P.2d 1060]

**CONDOMINIUMS CONSTRUCTED ON LAND IN COMPLIANCE WITH MSPA
[76-3-203, MCA]**

1. Definition: "Condominiums constructed on land divided in compliance with this chapter are exempt from the provisions of this chapter."
2. Exempt from local subdivision review and surveying requirements under MSPA.

3. Intended purpose of exemption:

To avoid making the construction and sale of condominiums come under subdivision review when the tract of land involved has already been approved for the construction of condominiums.

4. DHES review under MSIS - No. See 76-4-111, MCA.

5. Potential Problems: None

6. How to prevent misuse of this exemption: N/A

7. Legal opinions clarifying the use of the exemption:

* Condominiums constructed on land divided in compliance with the Act -- In order to qualify for the exemption from subdivision review contained in 76-4-111, MCA, a condominium must be located on a lot or on lots specifically approved for condominium development in a subdivision platted since July 1, 1973. Otherwise, every condominium development is subject to subdivision review. [39 Op. Att'y Gen. 28 (1981). Although this opinion concerned the application of Section 76-4-111(1), MCA, of the Sanitation in Subdivisions Act, it would also apply to identically worded Section 76-3-204, MCA, of the Subdivision and Platting Act.]

* Condominium conversions exempt -- Conversions of existing rental occupancy houses or office buildings to individual condominium ownership are exempt from the requirements of the Act. [39 Op. Att'y Gen. 74 (1982)]

SALE, RENT, OR LEASE OF A STRUCTURE OR IMPROVEMENT
[76-3-204, MCA]

1. Definition: "The sale, rent, lease, or other conveyance of one or more parts of a building, structure, or other improvement, whether existing or proposed, is not a division of land, as that term is defined in this chapter, and is not subject to the requirements of this chapter."
2. Exempt from local subdivision review and surveying requirements under MSPA.
3. Intended purpose of exemption:

To avoid making rental units or condominium conversions come under subdivision review, which could be administratively cumbersome.
4. DHES review under MSIS - No. (This exception does not apply to condominiums prior to their construction).
5. Potential Problems: N/A
6. How to prevent misuse of this exemption: N/A
7. Legal opinions clarifying the use of the exemption:

* Sale, rent, or lease of all or a portion of a building -- Because Section 76-3-204, MCA, exempts the rental of both existing and new buildings from subdivision review, the construction of a building for apartment use is not subject to regulation under the Act. [Lee v. Flathead County (1985), 217 Mont. 370, 704 P.2d 1060]

* Condominium conversions exempt -- Conversions of existing rental occupancy houses or office buildings to individual condominium ownership are exempt from the requirements of the Act. [39 Op. Att'y Gen. 74 (1982)]

STATE OWNED LANDS EXEMPTION [76-3-205, MCA]

1. Definition: The provisions of the MSPA shall not apply to the division of state-owned land unless the division creates a second or subsequent parcel from a single tract for sale, rent, or lease for residential purposes after July 1, 1974.
2. A survey is not required nor is a COS required to be filed with the Clerk and Recorder. The second and subsequent parcels are not exempt from local and DHES review. Senate Bill 91, passed by the 1989 Legislature, provides that any leased cabin or homesite or city or town lot that was under lease on the effective date of this bill must have a COS prepared when it is for sale. The sale of a lease is exempt from the subdivision laws, except that the development of any new, replacement, or additional water supply or sewage disposal system on the property must be approved under Section 76-4-1, MCA. [See Section 77-2-318(3), MCA]
3. Intended purpose of exemption:

To allow the Montana Department of State Lands (DSL) to sell or lease a parcel of state land on which an existing dwelling is located. On a number of DSL tracts a dwelling has been built in the past, and this exemption allows the DSL to divide off an acre and sell the lot and house without local subdivision review. However, the DSL may not use this exemption to sell two or more lots from a single tract for residential use. This exemption allows any state agency to divide its property for nonresidential purposes, or to create one parcel from a tract for residential purposes without review.

4. DHES review under MSIS - Yes (no distinction for state-owned land vs. other land). [See Section 77-2-318(3), MCA]
5. Potential Problems:

There are many existing leased cabin sites throughout the state which were not reviewed by DHES when they were leased, and no record of the leases are filed with the Clerk and Recorder. The majority of the cabins were leased prior to the DHES review law adopted in 1961 and were handled administratively through the Department of Administration. Unregulated sites may cause safety and financial problems for lot buyers, taxpayers, and local governments.

6. How to prevent misuse of this exemption: N/A.
7. Legal opinions clarifying the use of the exemptions:

* State agency project subject to review - In developing public recreational facilities the Montana Department of Fish, Wildlife and Parks is subject to local subdivision review under the act to the extent that it is creating an area which provides or will provide multiple spaces for recreational camping vehicles. [39 Op. Att'y Gen. 41 (1981)]

EXECUTION PRIOR TO JULY 1, 1973, OF DEEDS, CONTRACTS, LEASES, OR
OTHER CONVEYANCES
[76-3-206, MCA]

1. Definition: This chapter shall not be applicable to deeds, contracts, leases, or other conveyances executed prior to July 1, 1973.
2. Exempt from local subdivision review and surveying requirements.
3. Intended purpose of exemption:

This is a grandfather clause to exclude transactions which took place prior to July 1, 1973 (when the MSPA became effective) from compliance with the Act.

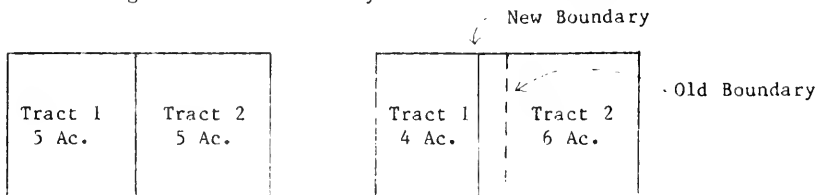
4. DHES review under MSIS - Yes, for subdivision lots recorded with sanitary restrictions prior to July 1, 1973. [See ARM 16.16.106(2)].
5. Potential Problems: None
6. How to prevent misuse of this exemption: N/A.
7. Legal opinions clarifying the use of the exemption:
 - * Previous divisions of land -- The Act does not apply to deeds prepared and executed prior to July 1, 1973, but not presented for recording until after June 30, 1973. [35 Op. Att'y Gen. 55 (1973)]

RELOCATION OF A COMMON BOUNDARY EXEMPTION [76-3-207(1)(a), MCA]

1. Definition: A division made outside of a platted subdivision for the purpose of relocating a common boundary line between adjoining properties.
2. Exempt from local subdivision review, but requires a survey.
3. Intended purpose of exemption:

To allow the owners of adjacent land to change the location of the boundary line between the properties. Legitimate reasons include: realigning the boundary to conform to natural geographical features or to remedy encroachment by a building, fence, or hedge; increasing the size of the parcel; or aggregating 2 or more parcels into larger tracts.

Also, as long as no new additional parcel is created (and there are still only two adjoining parcels), a boundary may be dissolved and relocated in whatever configuration is necessary.



4. DHES review under MSIS - Yes, unless one or more of the parcels is exempt under A.R.M. 16.16.605(1), or 16.16.605(2)(a-e). In the latter, exemption language should be stated on the plat.
5. Potential Problems:

Creating an additional parcel between the old and new boundaries rather than just changing the location of the common boundary between two parcels. By clearly showing the difference between the old and new boundary, with a dashed and solid line respectively, the creation of an additional parcel can be avoided. Once the deed is executed, the affected land attains an independent property description for a one-time only transfer of land. Once the COS is filed that tract cannot be reconveyed without filing another COS or subdivision plat.

6. How to prevent misuse of this exemption (use of Evasion Criteria):

Uniform standards for certificates of survey (ARM 8.94.3002) require that the COS clearly distinguish between the existing boundary and the new boundary. The new boundary could be shown with a solid line, and the old boundary with a dashed line. The final configuration must show only 2 parcels (i.e. you can not create a third parcel of land) -- Clerk and Recorder and Planners need to make sure that a third parcel is not created.

7. Legal opinions clarifying the use of the exemption: None

GIFT OR SALE TO A FAMILY MEMBER EXEMPTION [76-3-207(1)(b), MCA]

1. Definition: Divisions made outside of a platted subdivision for the purpose of a gift or sale to any member of the landowner's immediate family. Immediate family refers to the grantor's (landowner's) spouse, children, or parents by blood or adoption.
2. Exempt from local subdivision review, but requires a survey.
3. Intended purpose of exemption:

To allow an isolated transfer of a parcel to a family member for their personal use (the family member would actually occupy the parcel).
4. DHES review under MSIS - Yes.
5. Potential Problems:
 - A. May be used as a subterfuge to allow creation of many parcels for conveyance to family members for further resale.
 - B. Unlike the occasional sale, there is no mandatory 12-month waiting period before the family exemption may be used again.
 - C. State law does not limit the number of parcels that can be conveyed to an individual family member at any one time (difficult to judge what are attempted evasions).
 - D. Can thus create numerous contiguous parcels in a short period of time which become de facto unregulated subdivisions especially in combination with the occasional sale. Unregulated subdivisions cause safety and financial problems for lot buyers, taxpayers, and local governments.
6. How to prevent misuse of this exemption (use of Evasion Criteria):
 - A. Require a deed or other instrument of conveyance to accompany the COS to assure that the exempted parcels are actually transferred to the family member.
 - B. The COS must show: 1) the name of the grantee, relationship to the landowner and the parcel to be conveyed; 2) the landowner's certification of compliance (see F. below).
 - C. The following are some suggested types of criteria that may be used to evaluate whether an evasion of MSPA is occurring.

A second or subsequent family conveyance to the same family member will be presumed to have been adopted for purposes of evasion unless:
 1. Title to the first parcel conveyed to the family member is still held by that person.

2. The first parcel was conveyed to a family member more than 3 years previously.
3. The first parcel has not been further divided by use of exemptions.
4. A signed verification statement of the above by the landowner.
5. The proposed division of land must not result in a pattern of development which is the equivalent of a subdivision which by location or design becomes or establishes three or more parcels of less than 20 acres with common facilities such as a road, sewer, or water, and were divided from the original tract of record.

D. The COS must be accompanied by a deed or contract transferring interests in the parcel, or a statement detailing where the deed is in escrow, for how long, and authorization to contact the escrow agent for verification. The submitted deed or contract shall be recorded at the same time the COS is filed. A signed verification statement by the landowner must be submitted.

7. Legal opinions clarifying the use of the exemption:

* Member of immediate family -- "Member of the immediate family" as that term is used in the Act [section 76-3-207(1)(b), MCA] means the spouse of the grantor and the children or parents of the grantor by blood or adoption. 35 Op. Att'y Gen. 70 (1974) as clarified by informal opinion addressed to Alan L. Jocelyn, Esq., November 8, 1979.

AGRICULTURAL EXEMPTION WITH COVENANT [76-3-207(1)(c), MCA]

1. Definition: Divisions made outside of a platted subdivision by sale or agreement to buy and sell where the parties to the transaction enter a covenant running with the land and revocable only by mutual consent of the governing body and the property owner that the divided land will be used exclusively for agricultural purposes.
2. Exempt from local subdivision review, but requires a survey.

In order to convert the property covered by the covenant to a non-agricultural use, the governing body must consent to removing the covenant. The MSPA requires that a change in use from agriculture subjects the property to the "provisions of this chapter," which is generally interpreted to mean going through minor subdivision review. Most proposed changes in use will be for homesites. The proposed change in use is subject to a public interest determination, installation of improvements, and where applicable, conformance with zoning and other regulations or an adopted comprehensive plan. Structures requiring water or sewer facilities must also receive MSIS approval.

3. Intended purpose of exemption:

To allow creation of parcels smaller than 20 acres for agricultural use. "Agricultural use" means the use of land for the raising of crops or livestock, or preservation of open space. It does not mean farms, ranches, or homesites where a dwelling or other structure requiring water or sewer will be built. Creating a legitimate agricultural parcel without local review is appropriate because agricultural uses do not cause the development-related problems of concern under MSPA.

4. DHEC review under MSIS - No.

5. Potential Problems:

- A. A landowner can divide a parcel under the agricultural covenant, avoid both MSIS and MSPA reviews, and then sell the parcel. The subsequent buyer not knowing about the agricultural covenant then inadvertently finds himself burdened with a parcel that can not legally be used as a home site.
- B. Lack of a definition of "agricultural use". This could be clarified in local regulations under evasion criteria. What kind of structures, if any, are legitimate agricultural uses? What kind of activities are legitimate agricultural uses, and not commercial or industrial?
- C. A new or subsequent owner may not be aware of the prohibition against residential on the use of the parcel. The unwary buyer bears the risk of not being able to put the land to the use intended.
- D. Situations may arise where the original property owner who imposed the agricultural covenant intended it as a permanent restriction on the

land. At the time the covenant is written, language could be added on the covenant that when it is revoked, the original owner would be a party to the revocation.

6. How to prevent misuse of this exemption (use of Evasion Criteria):

The property owner should be required to demonstrate that the parcel can and will actually be used for a legitimate agricultural purpose:

- A. Require that the prospective buyer provide plans, a statement, or other evidence that the parcel actually will be used for agricultural production.
- B. Specify the meaning of agricultural use in the local regulations i.e., no dwellings, commercial or industrial structures. Appropriate uses could be: pasture, row crops, sheds, barns, fences, storage bins, buildings and other structures associated with raising crops or livestock. Inappropriate uses are residential structures and agricultural processing uses such as grain elevators, alfalfa dehydration plants, feed lots, farm and ranch equipment dealerships, or veterinary clinics. Agricultural use could be defined as meaning the production of crops or livestock only. Those processes or activities that create sanitation, traffic and other development problems would be prohibited.
- C. By local policy, agricultural land proposed for sale to an adjacent landowner could be exempt from local review under relocation of a common boundary. This would avoid the creation of a separate parcel (i.e. don't use the agricultural exemption where a boundary relocation could accomplish the same purpose).

7. Legal opinions clarifying the use of the exemption: None.



OCCASIONAL SALE EXEMPTION [76-3-207(1)(d), MCA]

1. Definition: One sale of a division of land within any 12-month period (or 365 days). The one year is triggered at the time of sale, or actual transfer of the deed, not the filing of the COS.

2. Exempt from local review, but requires a survey.

3. Intended purpose of exemption:

To allow a landowner the privilege of making infrequent divisions from a tract without review, on the premise that creating a single parcel on occasion will not create serious impacts.

4. DHES review under MSIS - Yes.

5. Potential Problems:

A. Create 20 acre parcels and then split each of those into smaller parcels using the occasional sale.

B. In combination with the family conveyance, can create de facto subdivisions in a short period of time.

C. Three or more parcels may be created with one survey by taking an occasional sale out of the middle of a tract and creating 2 remainder parcels.

Remainder	Occasional Sale	Remainder
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Thus, it is possible to create unregulated de facto subdivisions using the occasional sale. Unregulated subdivisions cause safety and financial problems for lot buyers, taxpayers, and local governments.

6. How to prevent misuse of this exemption (use of Evasion Criteria).

A. Determine whether within the past 12 months any other occasional sale has been taken from the tract or from contiguous tracts held by the same owners. Get this acknowledgment from the property owner.

B. Determine whether the proposed division of land will leave more than one remaining tract of less than 20 acres; i.e., is the exempted parcel located between two remainder parcels?

C. When determining whether there is an attempt to evade the MSPA, the local governing body may want to consider looking at both the person conveying the parcel and the parcel being conveyed. There may be cases where the same person is trying to subdivide land into noncontiguous

tracts in a small area which would eventually result in a de facto subdivision.

D. A COS may not show an occasional sale exemption in combination with any other exemption. [See 40 Op. Att'y Gen. 16 (1983)]

E. If an occasional sale exemption is claimed and the parcel has not been sold within the 12-month period, then a second occasional sale cannot be claimed, even though 12 months has elapsed, until after the first has been sold. This exemption was not intended as a means to stockpile parcels using the occasional sale exemption.

7. Legal opinions clarifying the use of the exemption:

- * Occasional sale -- (Montana Supreme Court decision). If an occasional sale exemption is employed in an attempt to evade the Act, the division of land in question is to be treated as a subdivision. [State ex rel. Dept. of Health and Environmental Sciences v. LaSorte (1979) 182 Mont. 267, 596 P.2d 477 (Dictum)].
- * Occasional sale -- (Attorney General's Opinion). The 12 month limitation period on occasional sales of land in sections 76-3-207(1)(d) and 76-3-103(7), MCA, commences with the actual transfer of interest in the parcel of land from the grantor to the grantee. [38 Op. Att'y Gen. 117 (1980)]
- * Occasional sale -- (Attorney General's Opinion). A single certificate of survey may not reflect the creation of more than one lot to be conveyed under the occasional sale exemption provided in section 76-3-297(1)(d), MCA, nor may a certificate of survey qualify for the occasional sale exemption if it divides a parcel of land more than once regardless of the nature of the other parcels created. [40 Op. Att'y Gen. 16 (1983) as clarified by letter opinion to Jim Nugent, Esq., Sept. 21, 1983]
- * Occasional sale -- (Attorney General's Opinion). Land within a parcel created without subdivision review pursuant to the occasional sale exception in the Act may not again benefit from that exception during the 12-month period following the original transfer. [41 Op. Att'y Gen. 21 (1985)]
- * Occasional sale -- (Attorney General's Opinion). When a parcel of land has been divided into parcels of 20 acres or more, each of the owners of the new parcels is entitled to use the occasional sale exception once during the 12-month period following the conveyance of the parcels. [Opinion addressed to Robert Zeigler, Oct. 3, 1985].
- * Occasional sale -- (Attorney General's Opinion). When a tract of land is divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. [41 Op. Att'y Gen. 40 (1986)]
- * Evasion Criteria, occasional sale -- (Montana Supreme Court decision

and revised opinion). This court case upheld the authority of Gallatin County to regulate the subdivision of land through the adoption and enforcement of evasion criteria. It also declared void that portion of Gallatin county's subdivision regulation which sets out an automatic rule to determine when an occasional sale is an attempt to evade MSPA. The revised opinion (February 1989) upheld that the governing bodies may use discretion, or have the power and the duty to evaluate and determine from all circumstances whether the proposed division of land is based on a purpose to evade. [State of Montana ex rel. Leach v. Gallatin Co. Board of Commissioners (Gallatin Co., No. DV-87-401, 1988); 767 P.2d 858, 45 St. Rptr. 2035]

**MINOR REDESIGN OF 5 OR FEWER LOTS WITHIN A PLATTED SUBDIVISION
WHICH DOES NOT CREATE ADDITIONAL LOTS - AMENDED PLAT - NO REVIEW
[76-3-207(1)(e), MCA]**

1. Definition: Within a platted subdivision, 5 or fewer lots may be rearranged or redesigned through boundary relocations or aggregation of lots, which do not create any additional lots.
2. Exempt from local subdivision review and governing body approval, but requires certification from the landowner on the plat that the approval of the governing body is not required pursuant to 76-3-207(1).
3. Intended purpose of exemption:

Relocation of boundaries or aggregation of lots within a previously approved subdivision of only 5 lots or less potentially should not cause any changes to the development or approval status.

4. DHES review under MSIS - Yes, unless the lots are located within an area covered by a comprehensive plan or in a class 1 and 2 city, and will be served by municipal water and sewer facilities and no extension of those facilities is proposed.
5. Potential Problems:

Under 76-3-207(1)(e), MCA, states that "for five or fewer lots within a platted subdivision, relocation of common boundaries and the aggregation of lots" a COS can be filed, and no local review is required. The model subdivision regulations and subdivision administrators manual advise filing an amended plat for record keeping purposes and public disclosure, although governing body approval is not required. The surveying regulations require that any changes made to a subdivision plat must be shown on an amended plat and filed with the clerk and recorder.

6. How to prevent misuse of this exemption: N/A.
7. Legal opinions clarifying the use of the exemption:

* Use of exemptions within platted subdivisions - Section 76-3-201(2), MCA, which exempts from the requirements of the Act divisions of land created to provide security for construction mortgage, lien, or trust indentures applies both within and outside of platted subdivision. [West v. Klundt (Yellowstone County, No. DV-79-1221, 1979)]

RELOCATION OF A COMMON BOUNDARY EXEMPTION [76-3-207(1)(f), MCA]

1. Definition: Became effective October 1, 1989, and amends Section 76-3-207 (1), MCA to add (f). To exempt from subdivision review the relocation of a common boundary line between a single lot within a platted subdivision and adjoining land outside the subdivision. Under this provision, any restrictions or requirements which apply to the original platted lot or to the original unplatted parcel continue to apply to those areas.
2. Exempt from local subdivision review, but requires a survey.
3. Intended purpose of exemption:

To exempt from subdivision review relocations of the perimeter boundaries of subdivisions which affect only one lot.

Also, as long as no new additional parcel is created, a boundary may be dissolved and relocated in whatever configuration is necessary.

4. DHES review under MSIS - Yes, unless one or more of the parcels is exempt under A.R.M. 16.16.605(1), or 16.16.605(2)(a-e), in which case, exemption language must be stated on the plat.
5. Potential Problems:

There is the potential problem of adversely affecting the configuration of the approved subdivision. There is also the potential problem of creating an additional parcel between the old and new boundaries rather than just changing the location of the common boundary between two parcels. By clearly showing the difference between the old and new boundary, with a dashed and solid line respectively, the creation of an additional parcel can be avoided. Once the deed is executed, the affected land attains an independent property description for a one-time only transfer of land. Once the COS is filed that tract cannot be reconveyed without filing another COS or subdivision plat.

6. How to prevent misuse of this exemption (use of Evasion Criteria):

Uniform standards for certificates of survey (ARM 8.94.3002) require that the COS clearly distinguish between the existing boundary and the new boundary. The new boundary could be shown with a solid line, and the old boundary with a dashed line.

7. Legal opinions clarifying the use of the exemption: None

EXEMPTION FOR LANDS ACQUIRED FOR STATE HIGHWAYS [76-3-209, MCA]

1. Definition: Instruments of transfers of land that are acquired for state highways may refer by parcel and project number to state highway plans that have been recorded in compliance with 60-2-209, MCA, and are exempted from the surveying and platting requirements of this chapter.
2. Exempt from local subdivision review and surveying requirements.
3. Intended purpose of exemption:

At times, in buying highway right-of-way, the Montana Department of Highways finds itself owning small tracts that are unnecessary to the Department's needs for right-of-way. Under this exemption the DOH may sell those unneeded parcels if they are shown on highway plans that have been recorded with the county Clerk and Recorder. The deed or other instrument of conveyance may simply refer to the parcel and highway project number.

If the parcels are not shown on highway plans or recorded, the parcels must be surveyed and the survey filed as a COS or a subdivision plat.

4. DHES review under MSIS - No.
5. Potential Problems: None.
6. How to prevent misuse of this exemption: N/A.
7. Legal opinions modifying the exemptions: None.

DISCUSSION OF "REMAINDER" UNDER THE M.S.P.A.

The term "remainder" does not appear in the MSPA, but has come into use as a matter of convenience to identify the parcel of land that "remains" after another parcel has been segregated from an original tract.

Central to the popular understanding of the "remainder" is the mistaken notion that any parcel so labeled is, by that fact alone, exempt from the surveying and subdivision requirements of the Act. In fact, section 76-3-401, MCA, requires that all divisions of land "for sale," other than subdivisions, which cannot be described as 1/32 (one-thirty-second) or larger aliquot part of a section be surveyed. Consequently, if a "remainder" is being created "for sale," it is subject to the Act's surveying requirements unless it meets the 1/32 (one-thirty-second) aliquot part criterion.

Similarly, all parcels of land, including "remainders," containing less than 20 acres which have been created "in order that the title to or possession of the parcels may be sold, rented, leased or otherwise conveyed" are subject to regulation as subdivision lots and must be surveyed unless they qualify for one of the Act's specific exemptions [see sections 76-3-105 (15), 76-3-201 through 76-3-209 and 76-3-402, MCA].

On the other hand, it appears that a "remainder" parcel which is not being created for purposes of sale or other conveyance is not subject to either the surveying or the review requirements of the Act regardless of its size.

If the filing of a certificate of survey or subdivision plat will create one or more tracts of land in addition to those which were actually surveyed, and are shown on the certificate or plat, the clerk and recorder must, under sections 76-3-103(15), 76-3-104, 76-3-401, 76-3-402(1) and (2), and 76-3-404(3), MCA, and ARM 8.97.3002(4)(m) and 8.97.3003(2)(k), determine whether those unsurveyed and unshown parcels are, in fact, being created for purposes of conveyance. If they are, and are not otherwise exempt from the Act's requirements, they must be surveyed and reviewed as subdivision lots depending on their size.

Because intention is difficult to ascertain and verify, this determination should be based not only on the representations of the property owner but also on a consideration of the circumstances surrounding the division of land such as the size of the "remainder" and emerging patterns of land divisions and sales in the area. A person who claims that a "remainder" is not being created for sale and is therefore exempt from the Act may be required to affirmatively demonstrate the validity of this claim.

Remainders in combination with the occasional sale and family conveyance may create de facto unregulated subdivisions. Unregulated subdivisions may cause financial and safety problems for lot buyers, taxpayers, and local governments.

Inconsistency between MSPA and MSIS:

Under MSIS remainders must be shown on a COS, and under MSPA they are not required to be surveyed. Under MSPA locals have authority to prevent use of

remainders which are evasions of subdivision review.

How to prevent misuse of the "remainder" concept:

1. Do not allow a tract to be identified or treated as a "remainder" unless the property owner demonstrates to the satisfaction of the governing body that the tract is not being created for the purpose of sale, rent, or lease.
2. Do not permit the use of the "occasional sale" or "family conveyance" exemptions where a parcel less than 20 acres would remain, unless a legitimate exemption is claimed for the remaining parcel.
3. Limit use of exemptions to situations where no remainder of less than 20 acres would result.

Legal opinions relating to "remainders":

- * "Remainder" not part of a subdivision - (Attorney General's Opinion) A "remainder" which is created by the segregation of a subdivision from a larger original tract is not part of the subdivision. For purposes of this opinion, a remainder is that part of an original tract which is left following the segregation of other parcels from the tract for the purpose of transferring these other parcels. To qualify as a "remainder" a parcel must not have been created for purposes of transfer and must be retained by the owners. [Letter opinion to Robert M. McCarthy, Esq. April 22, 1987]
- * Occasional sale and remainder - (Attorney General's Opinion) When a tract of land has been divided into two parcels, each under 20 acres in size, and one of the parcels is sold as an occasional sale, the remaining parcel may not, in the absence of another legitimately claimed exemption, be sold without subdivision review within 12 months following the sale of the first parcel. [41 Op. Att'y Gen. 40 (1986)]
- * What parcels must be surveyed - (Attorney General's Opinion) Only those parcels which are segregated from an original tract for purposes of transfer are subject to the Act's surveying requirements. A "remainder", i.e., that portion of an original tract which is not itself created for transfer but which is left after other parcels are segregated for transfer, is not subject to the Act's surveying requirements regardless of its size. [Letter opinion to Robert McCarthy, Esq., April 22, 1987]



11